99TH CONGRESS
1st Session

SENATE

EXEC. REPT.
99-2

GENOCIDE CONVENTION

REPORT

OF THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

ON

THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, EXECUTIVE O., 81ST CONGRESS, 1ST SESSION

JULY 18, 1985.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

50-113 O

WASHINGTON : 1985

S384-1

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Mr. LUGAR, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL AND SUPPLEMENTAL VIEWS

[To accompany Ex. O., 81st Congress, 1st Sess.]

The Committee on Foreign Relations, to which was referred the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously by the General Assembly of the United Nations in Paris, and signed on behalf of the United States on December 11, 1948, having considered the same, reports favorably thereon, and recommends that the Senate give its advice and consent to ratification subject to the eight provisos set forth in this report.

I. PURPOSE AND SUMMARY OF THE CONVENTION

PURPOSE

The Genocide Convention has two purposes. The first is to codify international law respecting the crime of genocide. The second is to require the parties to the Convention to deter acts of genocide and punish, pursuant to their municipal laws, individuals who commit genocide.

SUMMARY

The Convention consists of 19 articles. Articles I through VIII define the acts which constitute genocide and the responsibilities each party assumes to prevent and punish genocide. Article IX provides that disputes about the meaning of any article are to be

heard by the International Court of Justice. The remaining 10 articles concern technical matters such as where the instruments of ratification are to be deposited, how the Convention may be amended and the official languages of the Convention.

II. Committee Comments

The Genocide Convention is a response to the attempt by the Nazi regime to eliminate European Jews. After World War II representatives from a host of countries convened at the United Nations determined to see that such an atrocity would never again take place. The result of their efforts was an agreement whereby each country pledged to outlaw acts of genocide and to punish their perpetrators. The Convention was approved by the General Assembly of the United Nations on December 9, 1948 and submitted to member states for ratification.

President Truman asked the Senate to approve the Convention in 1949. Presidents Kennedy, Johnson, Nixon, Ford, and Carter each renewed this request. On September 6, 1984, President Reagan became the seventh President to urge the Senate to give its consent to ratification:

> Our failure to ratify this treaty . . . has opened the United States to unnecessary criticism in various international fora. We can refute such baseless criticism by ratifying the Convention, and more importantly, we can utilize the Convention in our own efforts to expand freedom and fight human rights abuses around the globe. . . . Ratification . . . would reaffirm . . . the fundamental and timeless American commitment to human rights.

The Committee joins these seven Presidents in urging the Senate to endorse the Genocide Convention. Like President Reagan, the Committee believes the United States has been subject to unneeded criticism because it has not ratified the Convention. As then Ambassador to the United Nations Jeane J. Kirkpatrick explained to the Committee last fall:

> The Soviets and others hostile to the United States have long focused on the United States' failure to ratify the Convention as part of their anti-American propaganda. It is contrary to our national interest to provide fuel to this campaign. . . .

To speak of ratification only in terms of the propaganda advantage to be gained, however, is to belittle the Convention. As President Reagan has observed, ratification means much more than this. It symbolizes the nation's commitment to human rights. In the words of Elie Wiesel, a survivor of the Holocaust now an American, ratification "would reaffirm our common belief that we have been and remain a nation governed by moral principles." This is why the United States should ratify the Convention.

The Committee therefore earnestly recommends the Senate give its consent to the ratification of the Convention. It does this fully aware that the Senate has refused to do so for 36 years despite the requests of seven Presidents. Not that this refusal has stemmed from reluctance on the part of any Senator to endorse the princi-

ples represented by the Convention. Rather, as the testimony presented to the Committee over the years amply demonstrates, the Senate's failure to approve the Genocide Convention has been the result of differing perceptions of what the Convention is meant to be.

To some, it is principally a moral statement, a way of expressing outrage at the genocides of the past. The Convention, in this view, is largely symbolic. To others, however, the Convention is first and foremost a legal document. It commits the United States to a number of international obligations, some of which are not clearly defined. The Convention also creates obligations under United States law. The domestic and international legal ramifications of ratification, in this view, are far more significant than the symbolic statement ratification makes. It has been the inability to reconcile these differing views that has led to the impasse over the Convention.

In recommending the Senate finally approve the Convention, the Committee has sought to bridge the gap between these two views. It has developed a set of eight provisos to the Convention. These eight do two things. On the one hand, they delineate and qualify the domestic and international legal obligations that the United States will incur by ratifying the Convention. At the same time, they preserve the integrity of the Convention and the symbolic value that will inhere from ratification.

The Convention has done little to prevent genocide. Although this is a great tragedy, it is no reason for the United States to reject it. The Genocide Convention is an attempt to express an ideal through law. Because not all have lived up to that ideal does not mean that ideal should be abandoned. To the contrary, it should be reaffirmed in the hope that what is today an aspiration will tomorrow become a standard.

The Convention is not a perfect document. This is no reason to reject it either. Any party to the Convention may invoke procedures to amend it. Rather than standing aloof from the Convention because of its imperfections, those who wish to see it perfected should take the lead in ratification. Only as a party to the Convention can the United States realistically affect changes in it.

It is now time for the United States to become a party. President Reagan has renewed the requests of his predecessors that the Senate give its consent. The Committee has resolved the legal issues that have stood in the way of Senate approval in the past. There is no longer reason for delay.

III. Committee Consideration

The Convention has been before the Committee since 1949. Hearings were first held in 1950. Additional hearings were called in 1970, 1971, 1977, 1981, 1984 and most recently in March of this year. At these hearings over 200 witnesses, representing a diverse number of organizations and points of view, presented testimony.

The Committee has reported the Convention favorably on five previous occasions: 1970, 1971, 1973, 1976 and 1984. The Convention, however, has never been brought to a vote by the Senate. It was considered during the Ninety-third Congress, when two at-

tempts to limit debate failed, and again in the closing days of the Ninety-eighth Congress, when time ran out before final action could be taken.

The Committee again turned to the Genocide Convention early in this Congress. On March 5 another day of hearings was held. In addition to representatives of the Departments of State and Justice, the following public witnesses gave testimony:

John C. Shepherd, President, American Bar Association.
Prof. Grover Rees, III, University of Texas Law School.
Prof. John Norton Moore, University of Virginia Law School.
Prof. Robert A. Friedlander, Ohio Northern University College of Law.
The Honorable Elie Wiesel, Boston University.
Mr. Howard Phillips, Conservative Caucus.
Ms. Phyllis Schlafly, Eagle Forum.
Ms. Iris L. Shidler, Central Committee of American Independent Party.
Ms. Tricia Katson, Liberty Lobby.

At this hearing Senator Helms presented eight provisos or conditions which he proposed adding to the resolution of ratification. The Committee met to consider the Convention on April 25. The provisos offered by Senator Helms were discussed at length. A number of perfecting amendments were adopted. At the suggestion of Chairman Lugar, the meeting was recessed so that Committee staff, Members' staff and representatives of the Administration could resolve several technical issues that were raised during the meeting.

The Committee reconvened on May 21. A revised set of eight provisos was offered by Senator Lugar for himself and Senator Helms. At the request of Senator Mathias, the provisos were divided into two parts, the first with those similar or identical to the provisos the Committee had approved in previous years and the second containing the additional ones sponsored by Senator Lugar and Helms. The former were approved unanimously. The vote to include the new ones was 9–8 with Senators Lugar, Helms, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans and Zorinsky voting in the affirmative and Senators Pell, Biden, Sarbanes, Cranston, Dodd, Eagleton, Kerry and Mathias voting in the negative.

One of the four new provisos offered by Senators Lugar and Helms states that the United States will not appear before the International Court of Justice (ICJ) in disputes concerning the Genocide Convention without its express consent in each case. Senator Dodd offered a reservation that would in effect have limited the application of the Lugar/Helms ICJ proviso to only those states which themselves had a similar ICJ proviso. It was defeated 8–9 with Senators Pell, Biden, Sarbanes, Cranston, Dodd, Eagleton, Kerry and Mathias voting in favor and Senators Lugar, Helms, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans and Zorinsky voting no.

Senator Lugar then moved that the Committee report the Convention with a resolution of ratification containing the eight provisos. The Committee vote was 10–0. Those Senators voting to report the Convention in this way were Senators Lugar, Helms, Mathias, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans, and

Zorinsky. Senators Pell, Biden, Sarbanes, Cranston, Dodd, Eagleton, and Kerry were recorded present.

IV. Section-by-Section Analysis

Each article of the Convention is described below. The analysis is based upon the text of the article, the negotiating history and relevant commentary. Subject to the eight provisos discussed in Section V, the legal obligation the United States would incur by ratifying the Genocide Convention is set out in this section.

An International Crime

ARTICLE I

> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

This article has two purposes. First, at the time the Convention was drafted there was some uncertainty as to whether genocide was a crime under customary international law. Adoption of this article removes all doubt.

There was also some question about the status of acts committed in peacetime. The Nuremberg Tribunal had ruled that the persecution of the Jews in Germany before September 1, 1939 was not punishable under its Charter. Some interpreted this ruling to mean that genocide could only be committed in wartime. To insure that all acts of genocide would come within the Convention's prohibition, explicit reference to acts in peacetime as well as in wartime was included.

The term "crime under international law" has a variety of meanings. As used in the Genocide Convention, it combines two ideas: internationally authorized municipal criminal law and municipal criminal law common to civilized nations. Parties to the Convention undertake to enact domestic legislation making genocide a municipal crime. Thus, common to the municipal law of all parties to the Convention is a proscription against genocide, a proscription enacted as part of each party's obligation under the Convention.

Acts Constituting Genocide

ARTICLE II

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article II is the crux of the Convention. It defines the crime of genocide. Under Article II, genocide is the commission of any of the five acts listed in Article II against any of the four groups identified in the article provided that the acts are committed with the specific intent to destroy the group in whole or substantial part. Each element must be present for the act to constitute the crime of genocide.

The five acts enumerated in Article II are inclusive. No other act, no matter how detestable, is genocide as defined by the Convention. Of the five, the first is the most clearcut. Killing group members, by whatever method, is flatly prohibited.

"Causing serious bodily or mental harm" is the second act listed in Article II. The harm must be grievous. The object of the Convention is to protect groups by safeguarding the welfare of their individual members. The injury inflicted upon the individual group members must therefore be such as to endanger the continued existence of the group. For an act to constitute serious bodily harm, it must cause substantial physical injury. Mental harm means the permanent impairment of mental faculties through drugs, torture or similar techniques.

The third act described by Article II is the deliberate infliction of conditions of life calculated to bring about the physical destruction, in whole or substantial part, of the group. The use of the term deliberate indicates that there must be premeditation. Conditions that might fall under this heading are the placing of the group members on a starvation diet or the withholding of minimum medical services. Whatever conditions are imposed must be meant to cause death or, at the least, grave bodily injury to a substantial number of group members.

The fourth specific act enumerated in Article II is the imposition of measures intended to prevent births within the group. The use of the word "intended" emphasizes that the perpetrator must know in advance that his actions will result in the prevention of births; an unforeseen result is not enough. As a practical matter, this should not reduce the scope of this section. The types of measures contemplated by this section are compulsory sterilization and coerced abortion. The consequences of these kinds of measures are plain to all.

The forcible transfer of children is the fifth and last act listed in Article II. The transfer must be of a substantial number of children; it must be a permanent transfer; and an element of coercion must be present. Like the other four acts, the transfer must be undertaken with the specific intent to destroy the group. Unlike the first four, there is no requirement that the act lead to the destruction of the group by causing the deaths of the group's members or preventing procreation. The transfer of children destroys the group by destroying its identify as a group. This is the only one of the five acts that can result in genocide in this way.

Article II limits the crime of genocide to acts aimed at the destruction of "national, ethnical, racial or religious groups." The terms are meant to extend coverage of the Convention to as many groups as possible. The principal group excluded from Article II is a group that is identifiable on the basis of its political beliefs alone. A group defined solely by its opposition to an occupying power, for example, is not protected by the Convention.

The degree of culpability that must accompany one of the acts listed in Article II for there to be genocide is very high. Article II requires that the act be "committed with intent to destroy" a protected group. In other words, it must be the conscious objective of the perpetrator to engage in conduct that would cause the destruction of the group. Acts which lead to the destruction of a group without that being the actor's purpose are excluded; an amendment which would have included such acts was rejected by the drafters.

The aim of the Convention is to deal with action against large numbers of people. The perpetrator must intend to affect a substantial number of the group's members by his acts for those acts to constitute genocide. "Substantial" means a large enough number of individuals such that their destruction or loss would cause the destruction of the group as a viable entity.

Punishable Acts

ARTICLE III

The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Five acts are made punishable by Article III. Of the five, four require little comment. One is the actual commission of genocide. The others are conspiracies and attempts to commit genocide and complicity in genocide. The negotiating history of the Convention indicates that these latter three offenses are based on common law doctrines. The elements associated with these under American criminal law must therefore be established for the act to be punishable under Article III.

The fifth act the parties are required to punish is incitement. To incite is to prompt to action. This prompting can be oral or written. Article III requires it to be direct. This appears to mean that the words used must actually advocate the commission of genocide. They must also be public. This suggests they must be addressed to a substantial number of people.

The line between persuasion and incitement is difficult to draw. For this reason, concern was expressed that the incitement provision might infringe on the exercise of free speech. The American delegation tried to strike the section. It was retained in order to help deter acts of genocide; the prohibition on speaking or writing words which might encourage such acts was believed to be essential to this purpose.

How far the incitement provision reaches remains unclear. Does it, for example, include more than just statements which counsel or advise others to commit genocide? Advocacy of abstract doctrine may be enough. An attempt later in the negotiations to punish propaganda favoring genocide was defeated, partly because it was believed that all propaganda related to genocide fell within the incitement provision. 3 U.N. GAOR C.6 (87th mtg.) at 4–5, U.N. Doc. A/C.6/SR. 87 (1948).

It is also not clear how likely it must be for the incitement to lead to acts of genocide for it to be punishable. The probability of the result was not directly addressed by the negotiators. A provision making incitement punishable whether "successful or not" was stricken. One reason advanced for deleting the phrase was that it was redundant. 3 U.N. GAOR C.6 (85th mtg.) at 15, U.N. Doc. A/C.6/SR. 85 (1948). If unsuccessful incitement is in fact punishable, this suggests that it may not be necessary that there be a high probability that the incitement produce acts of genocide.

What types of incitement the parties to the Convention are obligated to punish is therefore not entirely certain. It may be more than incitement which is directed to producing imminent lawless action and is likely to produce such action. If so, the United States would be unable to fulfill its treaty obligation, for this is the only type of incitement punishable under current First Amendment jurisprudence. *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969).

The obligations imposed by the Convention and those imposed by the U.S. Constitution may thus come into conflict. As a consequence, the Committee recommends a reservation making it clear to the other parties to the Convention that in the event of any conflict, U.S. obligations under the Constitution are controlling. This reservation is discussed in the section on Committee Action below.

Punishment of Persons

ARTICLE IV

> Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article IV requires the parties to punish a leader of a government, a person who serves the government or a private individual unconnected with any government. The only exception to the rule laid down in Article IV is a limited one that applies to heads of state of constitutional monarchies. Under their national constitutions, these individuals cannot be brought to trial before the courts of their home country. No defense based on status is available to any other individual by the terms of the Convention.

Implementing Legislation

ARTICLE V

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Con-

vention, and, in particular, to provide effective penalties for persons guilty of Genocide or of any of the other acts enumerated in Article III.

Article V contains one of the basic obligations of the Convention. It requires the parties to enact whatever legislation is necessary to make genocide and the other acts listed in Article III a crime under their own domestic laws. Article V also makes it clear that the Convention provides no basis itself for punishing individuals: it is not self-executing. Individuals accused of genocide are to be judged according to the domestic law of the place where they are prosecuted.

Use of the term "necessary" indicates that new legislation will not in all cases be required. Where the acts to be punished under the Convention are already a crime under existing law, no additional laws need be enacted. The practice of a number of parties to the Convention confirms this interpretation. 64 U.N. ESCOR Commission on Human Rights, Study of the Question of the Prevention and Punishment of Genocide at 140–41, U.N. Doc. E/CN.4/Sub. 2/416 (1978).

Article V states that the parties will enact any additional legislation "in accordance with their respective Constitutions." There is a difference of opinion as to whether this refers only to the procedures to be followed or whether it also concerns the content of the legislation as well. In other words, does Article V mean only that supplemental legislation must be enacted in accord with constitutional procedures, *i.e.,* approval by a majority of both Houses of Congress and signature by the President? Or does it mean that the legislation must conform to the U.S. Constitution?

The negotiating record does not clarify the matter. The Committee therefore chose to address the issue of the relationship between the U.S. Constitution and the Convention by reservation. That reservation is discussed in the section on Committee Action.

Trial of Persons Charged With Genocide

ARTICLE VI

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

There are two parts to Article VI. The first states that the trial of an individual accused of genocide is to be before a domestic court of the state where the act took place. The negotiating history makes it clear, however, that this is not the only place where trial may be had. The state of which the individual is a national or the state against whose nationals the act was committed may also exercise jurisdiction. Article VI therefore does not require a party to the Convention to consider a request to extradite an individual to stand trial on charges of genocide in all instances. If that party's domestic law reaches the acts in question, that party may exercise jurisdiction over the individual.

The second part of Article VI imposes no obligation on any party. It provides that individuals accused of genocide may be tried by a competent international penal tribunal. Only those individuals under the control of a party which has agreed to the jurisdiction of the tribunal would be affected. Furthermore, Article VI does not require any party to agree to the jurisdiction of such a tribunal.

The creation of such a tribunal is a matter wholly separate from the Convention. A new convention would have to be drafted and a separate ratification procedure would have to be followed for a tribunal to come into existence. The negotiating history indicates that the reference in Article VI was included to save having to amend the Convention in the future if such a tribunal were created.

Extradition

ARTICLE VII

> Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.
>
> The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VII concerns requests between parties for the extradition of individuals accused of acts of genocide. It provides that, with one exception, these requests are to be governed by the municipal laws of the requested state. Article VII is not itself an extradition treaty. Nor does it require the negotiation of new treaties or the modification of existing extradition treaties.

In the United States, extradition may be granted only if there is an extradition treaty with the requesting state. The majority of U.S. extradition treaties list the offenses for which extradition may be sought. None of these list genocide. Accordingly, in the vast number of cases, U.S. "laws and treaties in force" will not permit the United States to extradite individuals accused of genocide. The United States may, of course, amend these treaties to add genocide to the list.

There are six modern extradition treaties which allow extradition in all cases where the offense is punishable under the laws of both the United States and the other party by imprisonment for at least one year. The countries with whom the United States has entered into this type of treaty are Costa Rica, Ireland, Italy, Jamaica, Sweden, and Thailand. All but Thailand are parties to the genocide Convention. Thus, once the obligation under Article V to enact necessary legislation giving effect to the Convention is met, the combined effect of Article VII and these five extradition treaties would be to require the United States to consider extradition requests from any of these five nations for acts of genocide.

Article VII prevents a party from denying an extradition request on the grounds that the crime is political. In the United States what constitutes a political offense is defined by the case law. Speaking generally, an offense is a political offense, and thus not extraditable, if: (1) the act was committed during a political upris-

ing; (2) the uprising involved a group of which the accused was a member; and (3) the act was incidental to the uprising. This defense would not be available where the offense for which extradition was sought was genocide.

In all other respects, however, Article VII would leave existing U.S. law with respect to extradition for the crime of genocide unchanged. A state seeking extradition would still have to present evidence to a magistrate or judge "sufficient to sustain the charge." The requirement that the acts for which extradition is sought must be criminal under the law of the United States and the requesting party would remain unchanged. An appeal of a finding adverse to the defendant would continue to lie through application for a writ of *habeas corpus*. Finally, the Secretary of State would still retain, subject to the deletion of the political offense exception, discretion to deny a request for extradition regardless of any ruling by the courts.

Role of the United Nations

ARTICLE VIII

> Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.

Article VIII does not impose any additional obligation on the parties. It restates the existing competence of organs of the United Nations with specific reference to acts prohibited by the Genocide Convention. It does not constitute an independent grant of authority to any United Nations organ to take actions that the organ would be unable to take absent Article VIII. Nor does it overcome any limitations contained in the United Nations Charter or elsewhere on the authority of that organ to act.

Article VIII was included to underline the fact that complaints of genocide could be brought directly to the Security Council, the General Assembly or other parts of the United Nations. Otherwise, the Convention might be interpreted as limiting complainants to the International Court of Justice.

Settlement of Disputes

ARTICLE IX

> Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Under Article IX, all disputes between the parties about the Convention are to be submitted to the International Court of Justice at the request of any party to the dispute. The Court's jurisdiction is

compulsory, that is, no subsequent specific consent is required for the Court to have jurisdiction over the parties. The Court will hear these disputes under Article 36(1) of its Statute. By Article 94 of the United Nations Charter and Article 59 of the Court's statute, the parties are bound to comply with the Court's decision. In the event of noncompliance, Article 94 provides that recourse to the Security Council may be had.

The disputes to be heard encompass all matters that may arise under the Convention: the meaning of different terms, the construction of various articles and whether a party has performed its obligations under the Convention. The Court is also directed to hear disputes "relating to the responsibility of a State for genocide or for any other acts enumerated in Article III." This is understood in the traditional sense of responsibility to another state for injuries sustained by nationals of the complaining state in violation of principles of international law.

Article IX commits the parties, in advance and with no exceptions or opportunities for withdrawal, to accept the jurisdiction of the International Court of Justice in matters involving the Genocide Convention. The Committee has recommended a reservation to this automatic and open-ended submission to the Court's jurisdiction. It is discussed in the section on Committee Action below.

Technical Articles

ARTICLE X

The present Convention, of which the Chinese, English, French, Russian, and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

ARTICLE XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-Member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

ARTICLE XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *proces-verbal* and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in Article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

In accord with Article XIII, the Convention entered into force January 12, 1951. For states ratifying after this date, the Convention becomes effective 90 days after the instrument of ratification is deposited with the Secretary General.

ARTICLE XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

ARTICLE XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

ARTICLE XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article XVI permits any party to initiate an amendment to the Convention. There are three steps in the process. The party sends the amendment to the Secretary-General of the United Nations. The Secretary then presents the proposal to the General Assembly. If the General Assembly approves the amendment, it is submitted to the parties for ratification.

ARTICLE XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in Article XI of the following:

(a) Signatures, ratifications and accessions received in accordance with Article XI;

(b) Notifications received in accordance with Article XII;

(c) The date upon which the present Convention comes into force in accordance with Article XIII;

(d) Denunciations received in accordance with Article XIV;

(e) The abrogation of the Convention in accordance with Article XV;

(f) Notifications received in accordance with Article XVI.

This article requires the Secretary-General to circulate to all other parties the instrument of ratification of new parties. Each party is therefore on notice of the conditions attached to ratification by every other party.

ARTICLE XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in Article XI.

ARTICLE XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

V. Committee Action

A. The Senate's Role in the Treaty Process

1. Conditioning Approval on the Adoption of Senate Provisos

Article II, Section 2 of the Constitution provides that the President:

> shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, providing two-thirds of the Senators present concur.

The power to bind the United States to a treaty is thus one that the President shares with the Senate. Originally, Washington sought to effect this sharing by consulting with the Senate during treaty negotiations. That, however, proved unworkable and the present procedure soon evolved.

Under this procedure, the Senate, acting through the Foreign Relations Committee, carefully reviews all treaties submitted to the

Senate by the President. If that review reveals problems with the treaty, the Senate can reject the treaty. Alternatively, and more commonly, when the Senate finds fault with a treaty it corrects the problem through the adoption of amendments, reservations, understandings or declarations. The Senate's approval of a resolution of ratification with such provisos means that Senate consent to ratification is being given subject to these conditions.

The President may reject the Senate's conditions. He may not, however, ratify the treaty if he does. If the President accepts the Senate's conditions, he proceeds to ratify the treaty by signing an instrument of ratification. This is then either exchanged with the other parties to the treaty or deposited in accord with the procedures agreed to by the parties. Article XI of the Genocide Convention provides, for example, that instruments of ratification are to be deposited with the Secretary-General of the United Nations.

Unless there is an express statement by the Senate to the contrary, it is the Committee's firm view that all conditions adopted by the Senate are to be included in the instrument of ratification and therefore furnished to all other parties to the treaty. Not only does the Committee believe this to be the law, but it believes it to be essential for practical reasons as well. The Senate's conditions, together with the treaty and its accompanying documents, describe in full the obligation undertaken by the United States in ratifying the treaty. To insure an identity of expectations by all parties concerning the rights and obligations imposed by the treaty, each party should be accorded formal notice of the Senate's conditions. Notification by any method other than inclusion in the instrument of ratification simply increases the possibility of misunderstanding.

Executive branch practice has sometimes deviated from this procedure, most recently in the case of the 1976 Treaty of Friendship and Cooperation with Spain. The Committee is pleased to note that the Executive Branch has since regularly included all Senate provisos in the instrument of ratification. The Committee has been assured that Senate provisos to the Genocide Convention will likewise be included in the instrument of ratification.

Under Article XVII of the Convention, the Secretary-General of the United Nations is required to circulate the provisos contained in each party's instrument of ratification to all other signatories to the Convention. As a consequence, inclusion of the Senate provisos in the instrument of ratification insures that the other parties to the Convention will have notice of the terms on which the United States ratified the Convention.

2. The Effect of Senate Provisos to Multilateral Treaties

The Senate can condition its consent to the ratification of a treaty on the adoption of amendments, reservations, understandings, and declarations. In the case of the Genocide Convention, the Committee recommends the Senate adopt two reservations, five understandings and one declaration. Each type of proviso makes a different statement about the international legal obligation the United States would assume by ratifying the Genocide Convention; each can also have different consequences for the relationship between the United States and the other parties to the Convention.

A reservation is usually defined as a unilateral statement made by a contracting party which purports to exclude or modify the terms of a treaty or the legal effect of certain provisions. Ordinarily, it affects only the party entering it. All that is required of the other parties to the treaty is that they acquiesce in it. Their own treaty obligations among themselves remain unaffected.

The practice of entering reservations to multilateral treaties is widespread. The Netherlands, for example, entered nine separate reservations to the International Covenant on Civil and Political Rights at the time of ratification. Portugal included eight reservations in its instrument of ratification to the European Convention on Human Rights. A number of signatories have entered reservations to the Genocide Convention.

The procedures followed by other parties to a treaty in giving effect to reservations are also well-established. A state that wishes to enter a reservation must see that it is circulated to all other parties. These states then have a year in which to act. Each has the option of accepting or objecting to the reservation. In the event a party accepts the reservation, either expressly or by allowing a year to pass without objecting, the reservation becomes binding upon the accepting state and the reserving state in all disputes between the two.

A party may reject the reservation instead. When this occurs, the treaty relationship between the two states depends on how the objecting state views the reservation. The objector may declare that it believes the reservation to be inconsistent with the "object and purpose" of the treaty. The objecting state can then declare that it is not bound in a treaty relationship with the reserving state. Alternatively, the objecting state may reject the reservation without opposing the entry into force of the treaty between itself and the reserving state. In this event, those provisions of the treaty affected by the reservation do not apply between the objecting and reserving state.

In addition to two reservations, the Committee also recommends that the Senate include five understandings in the resolution of ratification to the Genocide Convention. An understanding is generally defined as a statement which interprets or clarifies the obligation undertaken by a party to a treaty. The Committee's understandings are based on the negotiating history of the Convention; the Committee believes that a review of this history would yield no contrary interpretation of the obligation in question. These understandings are recommended solely to clarify what the United States' legal obligations are under the Convention.

The practice followed in giving effect to understandings to a multilateral treaty is the same as that for reservations. The state issuing the understanding sees that it is circulated to the other parties. If another party fails to object to it, it is binding in all disputes between the two. If the understanding is rejected, the two parties either do not enter into a treaty relationship or do so absent the provisions to which the understanding applies.

In the unlikely event there is some dispute about a term to which a Senate understanding applies, the Committee wishes to state unequivocally that the Senate understanding is controlling. The extent of the United States' obligation is defined by the Senate

understandings. No contrary interpretation, whether the result of a decision of the International Court of Justice or some other tribunal, will supersede or nullify the U.S. understandings.

Moreover, so that there can be no doubt about the controlling effect of the U.S. understandings, the Committee decided to include the following in the text of the resolution of ratification:

> The Senate's advise and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention.

Accordingly, all parties will be on notice of the United States' position respecting the binding nature of these understandings. Any party which fails to object to them will be estopped from contesting them in any dispute involving the United States.

The Committee has also recommended that the Senate include as a condition of its consent to ratification one declaration. A declaration is generally defined as a formal statement, explanation or clarification made by a party about its opinion or intentions relating to issues raised by the treaty under consideration. Ordinarily, declarations do not touch upon a party's obligations under a treaty. Nonetheless, declarations of a party may be of assistance in interpreting a particular provision of a treaty. Accordingly, absent specific directions to the contrary, any declaration adopted by the Senate is also to appear in the treaty's instrument of ratification.

The fourth type of proviso upon which the Senate can condition its consent to ratification is an actual amendment to the text. An amendment, of course, changes the legal obligations of all parties to the treaty. Generally speaking, when the Senate requires that an amendment be adopted, the President must gain the assent of all other parties to the amendment before he may ratify the treaty on behalf of the United States.

No amendment to the Genocide Convention has been recommended by the Committee. Ninety-six other states have ratified the Convention as it was drafted. Thus, Senate approval conditioned on the adoption of an amendment would be tantamount to Senate rejection of the Convention. Furthermore, it is not necessary. Once the United States becomes a party to the Convention, it may invoke the procedures for amendment contained in Article XVI. If the full Senate wishes to see the Convention amended, it can direct the President to follow the steps set out in this article.

B. THE PROVISOS TO THE GENOCIDE CONVENTION ADOPTED BY THE COMMITTEE

The two reservations, five understandings and one declaration the Committee recommends are described below. The understandings that clarify the standard of intent required by Article II, that define mental harm, that part of the third understanding which relates to extraterritorial jurisdiction and the declaration on implementing legislation are similar or identical to ones recommended by the Committee in previous years. The reservation affecting the jurisdiction of the International Court of Justice and that providing that the Constitution is supreme over the Convention as well as the understandings which address the international penal tribunal,

armed conflicts and that part of the third understanding which covers U.S. extradition law have not been recommended before.

1. The World Court Reservation (Article IX)

> That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

Analysis

Article IX of the Convention provides that disputes concerning the "application, interpretation or fulfillment" of the Convention are to be submitted to the International Court of Justice, also known as the World Court, at the request of any party to the dispute. The Committee's recommended reservation will prevent the Court from asserting jurisdiction over the United States under this article. The International Court of Justice will not have jurisdiction over the United States in disputes arising under the Convention to which the United States is a party without the specific consent of the United States. Consent could be granted subject to the other parties' agreement to certain terms governing the ICJ's adjudication. The specific consent of the United States, in writing, will be required for each separate submission of a dispute involving the United States.

Discussion

This reservation gives the United States the option of deciding whether to accept the jurisdiction of the International Court of Justice (ICJ) in a given dispute under Article IX of the Genocide Convention. It is meant to address situations in which it is clear in advance that adjudication of a dispute by the ICJ would be contrary to the national interest. This could be true, for example, with cases brought solely for the propaganda value that might result. The reservation also gives the United States the latitude to appear on condition. The ability to condition the United States' consent to jurisdiction would, for example, allow the United States to define the scope of its acceptance of the ICJ's review in a particular case.

The Committee does not anticipate that the United States will rely on this reservation frequently, if at all. Nor does the Committee believe that its use will be controversial. The types of cases where it will be appropriate to withhold specific consent to ICJ jurisdiction will be plain to all. Moreover, the Committee expects the President to consult with Committee members when deciding whether to accept or decline jurisdiction. This will help insure that United States' practice is understood and supported.

The Committee recommends this reservation not out of disrespect for the World Court nor disregard for international law. To the contrary, the reservation demonstrates the seriousness with which the Committee views both. It has been suggested that if a case arises of the type described above, the United States could refuse to recognize the Court's jurisdiction or else ignore an adverse decision. A reservation, it is argued, is not necessary. To

refuse to recognize the Court's jurisdiction would be inconsistent with Article IX of the Convention; to ignore a Court order could conflict with the United States' obligation under the U.N. Charter. The Committee believes adoption of its recommended reservation, making clear in advance what the United States will agree to, shows a greater respect for law and for the Court than any after the fact action no matter how justified.

This reservation is not inconsistent with the object and purpose of the Convention. The resolution of disputes by the ICJ is not an integral part of the Convention. In the 34 years the Convention has been in force, not a single case has been submitted to the Court. Partly because of this experience, most of the more recent human rights treaties negotiated at the United Nations have either not contained an ICJ clause or else made it optional.

It is true that this reservation may affect the ability of the United States itself to submit disputes to the World Court. International law provides that a state may rely on another state's reservation in a dispute between the two. Were the United States to submit a dispute involving the Convention to the Court under Article IX, the other party could invoke the U.S. reservation in an effort to defeat the Court's jurisdiction. To some, this is reason to oppose the reservation. They envision the United States using Article IX to bring other nations before the Court to answer for the atrocities that have been perpetrated against peoples within their borders.

The Committee disagrees with the premise of this objection. Acts of genocide virtually always entail the connivance or active participation of state authorities. Almost by definition, regard for law by the rulers of such a state will be nonexistent. To expect them to respond to an international civil lawsuit challenging their actions is unrealistic.

Nor does the Committee believe that it would enhance the standing of the ICJ to ask it to issue a ruling that would be ignored. The Court has an important, if circumscribed, role to play in the resolution of disputes between nations. Respect for this role includes a respect for the Court's limits as an institution. When the Court takes on matters beyond its competency, as it attempted to recently, its very legitimacy is called into question.

This is not to say that the United States should remain silent in the face of genocidal acts by others. Quite the opposite. The Committee believes the United States should take a leading role in mobilizing the appropriate resources to deter and punish such acts. What the Committee does not want to see is the ICJ asked to engage in a futile exercise. There are other, better suited international fora where pressures against offending states can be brought to bear.

2. The Constitutional Reservation

> That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

Analysis

The first eight articles of the Convention impose a number of obligations on each party. Some are clear on their face; others are open to interpretation. If any article is construed to require the United States to act in a way barred by the U.S. Constitution, the Committee's reservation will excuse the United States from the obligation. There can thus be no conflict between U.S. obligations under the Constitution and those under the Convention. In the event of a conflict, the latter will extend no farther than what is permitted by the U.S. Constitution.

The determination of what action is prohibited by the Constitution is to be made according to U.S. law. In each case, the reservation puts responsibility for making the decision on the officials of the appropriate branch of the U.S. Government. This is why the phrase "as interpreted by the United States" is included. It assures that the reservation will not be construed as permitting the International Court of Justice, or some other tribunal, to determine, using its own standards, what is and is not permitted by U.S. Constitutional law.

Discussion

This reservation is similar to a statement former Supreme Court Justice Arthur Goldberg made when, as United Nations Ambassador, he initialed another human rights treaty for the United States. Testifying before the Committee in 1979, Ambassador Goldberg explained that the Senate's adoption of this reservation in treaties like the Genocide Convention would serve merely to reiterate the position United States representatives at the U.N. have taken over the years. It simply puts other parties on notice that the United States is maintaining the position announced during negotiations. In his view, the reservation is unremarkable.

Its purpose is to avoid placing the United States in the position of having to choose between its obligations under the Constitution and those under the Convention. Not that there can be any question as to which must be chosen. No treaty can override or conflict with the Constitution. The Constitution is paramount. *Reid* v. *Covert,* 354 U.S. 1 (1957).

Rather, the problem is that international law does not recognize the Constitution as supreme. Article 27 of the Vienna Convention on the Law of Treaties, which represents customary international law on this point, provides that no state may "invoke the provisions of its internal law as justification for its failure to perform a treaty." Internal law means a constitution as well as a statute. Thus, without the Committee's recommended reservation, were a conflict to arise between the requirements of the Constitution and those of the Convention, the United States might be found to be in default of its international obligation.

Article V of the Convention states that the parties must enact legislation "in accordance with their respective Constitutions." It is not certain whether this article refers solely to the procedures to be followed in passing legislation or whether it concerns the content of the legislation as well. If it includes the latter, the Convention by its terms would remove any chance for conflict between

itself and the Constitution. However, the Committee felt that this matter was too important to leave to chance; thus it recommends a reservation.

Conflict is most likely to occur between the First Amendment's proscription on legislation abridging free speech and Article III's requirement that "direct and public incitement to commit genocide" be punished. The contours of the latter remain to be defined. In response to a request for an advisory opinion, or as a result of a proceeding under Article IX, the ICJ could interpret Article III in a way inconsistent with the First Amendment.

Nor would this be particularly surprising. The criminal laws of many countries ban speech related to crimes such as genocide on the theory that this deters the acts themselves. The framers of our Constitution, on the other hand, were of a different view. As Justice Brandeis has reminded us, they thought that:

> discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; . . . that the fitting remedy for evil counsels . . . is good ones; [and that] believing in the power of reason as applied through public discussion, they eschewed silence coerced by law. . . . *Whitney* v. *California,* 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

The Genocide Convention is unique among the treaties the Committee has reviewed in that it touches upon such fundamental matters as the relationship between criminal law and the right of free speech. No other type of treaty, be it one of friendship and commerce, taxation or the like, raises these kinds of issues. Accordingly, unlike any other treaty that has come before the Senate, the Committee finds that a Constitutional reservation is appropriate.

In lieu of adding a Constitutional reservation, it has been suggested that the United States wait and see whether the Convention will give rise to an obligation in conflict with the Constitution. If it does, it is said, the United States can, at that time, either resolve the conflict or terminate its treaty obligations. The Committee does not find this approach to be consistent with a respect for international law. The Committee takes U.S. obligations under international law seriously. A corollary to this is that the Committee does not believe the United States should commit itself in advance to obligations it may not be able to meet.

The Committee reservation may never be invoked. Article V may be interpreted to apply to substance as well as form. The other articles may never be construed in a way inconsistent with the U.S. Constitution. Nonetheless, the Committee believes that prudence, as well as due regard for the obligations imposed by international law, recommends the reservation.

3. The Specific Intent Understanding

> That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II means the specific intent to destroy, in whole or substantial part, a national, ethnical, racial, or religious group as such by the acts specified in Article II.

Analysis

Under Article II, genocide is any one of five enumerated acts provided the act is committed with the "intent to destroy, in whole or in part" a protected group. This understanding makes clear that the type of intent referred to is specific intent. It also makes plain that where the act is aimed at the destruction of less than the whole group, it must be directed at a large enough number of individuals such that their loss would destroy the group as a viable entity.

Discussion

The purpose of this understanding is to distinguish between the crime of genocide and other acts. It does so by specifying the type of intent that must be present for an act to constitute genocide and by requiring that an act be aimed at destroying the group as a viable entity. It is similar to one the Committee has recommended in the past. It was approved unanimously.

The most significant difference between the crime of genocide and other acts is that genocide is accompanied by an intention to destroy a protected group in whole or part. During the negotiations on the Convention, an amendment was offered to extend the definition of genocide to acts which resulted in the destruction of a group. It was rejected. 3 U.N. GAOR C.6 (73rd mtg.) at 12, U.N. Doc. A/C.6/SR.73 (1948). A distinction was thus maintained between acts committed with the purpose of destroying a group and all other acts, whatever their consequences. In American criminal jurisprudence, the requirement that purposive behavoir be demonstrated is signaled by making specific intent an element of the offense. MODEL PENAL CODE § 2.02 commentary on culpability (Tent. Draft No. 4, 1955).

In addition to acts designed to destroy an entire group, genocide under Article II includes the destruction of a group "in part." The aim of the Convention is the prevention and punishment of acts undertaken on a mass scale. Thus, the reference to "in part" means to a substantial number of individual group members. An act must be intended to destroy the group as a viable entity to qualify as genocide. Isolated acts of violence against members of a group are thus excluded.

This understanding carefully delineates the acts that constitute genocide. One might ask why there is a need for such precision. After all, massive acts of violence directed at individuals because of their membership in a particular national, ethnic, racial or religious group would seem to be easily discernable.

The answer is that over the years the true meaning of the word genocide has been debased. The charge of genocide has come to be levelled against virtually any action with which the accuser disagrees. Raphael Lemkin, a Polish legal scholar, coined the term to describe what was happening to Jews in Nazi-occupied Europe. His purpose was to focus the outrage of all civilized people on the commission of such atrocities. The Committee hopes its own actions will help restore the meaning Lemkin intended.

4. The Mental Harm Understanding

That the term "mental harm" in Article II(b) means permanent impairment of mental faculties through drugs, torture or similar techniques.

Analysis

Article II(b) of the Convention requires each party to punish individuals who, with the specific intent to destroy a protected group in whole or substantial part, "cause serious bodily or mental harm" to group members. The Committee's recommended understanding clarifies the term mental harm in two ways. First, it insures that Article II is interpreted as banning only permanent harm. Acts which temporarily affect the mental faculties of group members are not covered. Second, it requires that the harm be the result of some physical intrusion into the body. Besides the injection of drugs, this would include electric shock and other acts which cause physical injury to mental faculties. Psychological harm resulting from living conditions, differential treatment by government authorities and the like is excluded.

Discussion

The words "or mental" were added to the article at the instance of the Indian delegation after a Chinese amendment that incorporated the idea of mental health was defeated. 3 U.N. GAOR C.6 (81st mtg.) at 13, U.N. Doc. A/C.6/SR. 81 (1948). The purpose of the Indian amendment was to include acts committed through the use of narcotic drugs. The Committee understanding brings out the idea that the harm must be caused by some actual physical injury. It accords with the interpretation of the Canadian government. 94 PARL. DEB. H.C. (6th sess.) 2442 (1952).

The offenses punishable under the Convention are those that outrage all civilized peoples. Acts causing mental harm might be construed to include a whole range of activities that, whatever else they may be, are not genocide. Attempts to read such lesser acts into the Convention would serve only to trivialize the true purposes of the Convention. The Committee understanding precludes such efforts.

5. The Extradition and Extraterritorial Jurisdiction Understanding

That the pledge to grant extradition in accordance with a state's laws and treaties in force found in Article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

Analysis

Article VII requires the parties to consider extradition requests for acts of genocide "in accordance with their laws and treaties in force." The first part of this understanding informs other signatories of a key part of U.S. extradition law. That part provides that

an individual may not be extradited for acts which would not be a crime if committed within the United States. Before extradition can be granted, it must be shown that the acts complained of, if true, would be a violation of U.S. law.

Article VI states that those accused of genocide are to be tried by a municipal court of the state where the act was committed. The second half of the Committee's understanding makes clear that this is not the only place where trial may be had. Any state may try its nationals for acts of genocide regardless of where the acts took place. Were, for example, a United States citizen accused of genocidal acts abroad, the United States could meet its obligations under Article VI by prosecuting him under United States law.

Discussion

This understanding addresses two issues: extradition and extraterritorial jurisdiction. The first part, which restates a portion of present U.S. extradition law, is new. The second, affirming the right of a state to try its nationals for acts committed abroad, has been approved by the Committee in previous years. The Committee does not believe either to be controversial.

Extradition is the surrender of an accused individual to another state for prosecution or punishment. Extradition procedures in the United States are set out in chapter 209 of Title 18 of the U.S. Code and in the case law construing that chapter. A state seeking extradition must furnish "evidence of criminality." The evidence is presented to a U.S. magistrate or Federal district court judge who decides if it is "sufficient to sustain the charge." In making the determination whether an individual is extraditable, the presiding officer must find that the acts for which extradition is sought would be a crime had they been committed in the United States. *Collins* v. *Loisel,* 259 U.S. 309 (1921).

These conditions apply to all extradition requests, whether the individual sought is a United States citizen, a citizen of the state requesting extradition, or a citizen of a third state. Thus, for example, if a citizen of a third state was sought for extradition from the United States on the grounds that he had incited others to commit genocide, extradition would lie only if the offending words would constitute incitement under U.S. law. The issue was discussed during the negotiations; the United States' position was made clear. 3 U.N. GAOR C.6 (100th mtg.) at 8, U.N. Doc A/C.6/SR. 100 (1948).

The second half of the Committee's understanding speaks to the issue of extraterritorial jurisdiction. It insures that nothing in Article VI is to be construed as denying to a state the right to try its nationals for acts committed abroad. It is in line with a statement agreed upon by the negotiators and included in the report on the Convention they submitted to the General Assembly. Report of the Sixth Committee, 3 U.N. GAOR C.6 (Agenda Item 32) at 500, U.N. Doc. A/760 & Corr. 2 (1948). In the event the United States were, in legislation implementing the Convention, to make it a crime for U.S. citizens to commit genocide abroad, prosecution by the United States of its nationals would meet the obligation imposed by Article VI.

6. The Armed Conflict Understanding

That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention.

Analysis

No act constitutes genocide under Article II unless it is committed with the specific intent to destroy a protected group in whole or substantial part. The Committee's understanding affirms that this requirement applies even in a situation where there is an armed conflict. None of the acts that are part of such a conflict are to be considered genocide absent the requisite intent.

7. The International Penal Tribunal Understanding

That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.

Analysis

Article VI contemplates the possibility of the establishment at some future date of an international penal tribunal to try individuals accused of genocide. Creation of such a tribunal would require the negotiation of a new treaty or an amendment to the Convention. If a future President were to decide that the United States should adhere to such a treaty, or accept an amendment to the Convention, the Committee's understanding would require him to seek Senate advice and consent pursuant to Article II of the United States Constitution. Accession by an executive agreement would be barred. The Committee's understanding puts both future Presidents and the other parties to the Genocide Convention on notice that Senate consent will be required before the United States can participate in any such tribunal.

Discussion

The international penal tribunal contemplated by Article VI represents a sharp departure from the concepts contained in the Genocide Convention. The Convention is an agreement among the parties to make certain acts criminal under their municipal laws and to prosecute individuals accused of violating them. The notion of an international penal tribunal suggests the existence of a body of law separate from the municipal laws of the contracting parties. What this law would be and what procedures would govern in proceedings before the tribunal remain to be determined.

From time to time different organs of the United Nations have considered draft conventions establishing such a tribunal. The Committee is extremely skeptical of these efforts. It notes, among other things, that serious Constitutional objections to U.S. participation have been raised. Given the novelty of the concept and the fact that U.S. adherence would raise many legal and policy issues,

U.S. agreement to a convention creating a penal tribunal should only be effected with the advice and consent of the Senate.

The method by which the United States would agree to the type of tribunal contemplated by Article VI is related to the Genocide Convention. The procedures the United States would follow in considering whether to participate is a matter of legitimate concern to the other contracting parties. It has international as well as domestic ramifications. Accordingly, the Committee has made this condition of Senate consent to ratification an understanding.

8. The Declaration on Implementing Legislation

> That the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

Analysis

By Article V, the parties must enact whatever legislation is required to make genocide and the other acts enumerated in Article III criminal under their respective domestic laws. The Committee's recommended declaration would condition ratification by the United States on passage of U.S. legislation giving the Convention effect. The declaration instructs the President to withhold depositing the instrument of ratification with the Secretary General of the United Nations until implementing legislation has become a part of U.S. law.

Discussion

This declaration was approved unanimously by the Committee. It is identical to one recommended in previous years. The Committee's declaration reinforces the fact that the Convention is not self-executing. In other words, no part of the Covention becomes law by itself. The Convention is effective only through legislation implementing its various provisions.

The declaration does not affect U.S. obligations under the Convention. Nor is it a statement of U.S. policy on matters related to the Convention. Rather, it addresses the domestic action that the Senate is requiring before ratification can go forward. For these reasons the Committee does not believe it necessary to include the declaration in the instrument of ratification.

VI. Text of Resolution of Ratification

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948 (Executive O, Eighty-first Congress, first session), *Provided that*:

I. The Senate's advice and consent is subject to the following reservations:

> (1) That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of

Justice under this article, the specific consent of the United States is required in each case.

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) That the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial or religious group as such by the acts specified in Article II.

(2) That the term "mental harm" in Article II(b) means permanent impairment of mental faculties through drugs, torture or similar techniques.

(3) That the pledge to grant extradition in accordance with a state's laws and treaties in force found in Article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in Article VI affects the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

(4) That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention.

(5) That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal only by a treaty entered into specifically for that purpose with the advice and consent of the Senate.

III. The Senate's advice and consent is subject to the following declaration:

That the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

VII. ADDITIONAL VIEWS OF SENATORS PELL, BIDEN, SARBANES, CRANSTON, MATHIAS, DODD, EAGLETON AND KERRY

This is the sixth time that the Genocide Convention has been reported favorably by the Committee on Foreign Relations. On each prior occasion the Committee has urged the Senate to give its advice and consent to ratification along with three understandings and one declaration. Last September, after a three-year Administration review of the Convention, President Reagan announced that he would "vigorously support" ratification of the Genocide Convention. Representatives of the Departments of State and Justice urged the Senate to "finally provide its advice and consent to U.S. ratification" and testified that the package of three understandings and one declaration was sufficient to address all the legal questions that has been raised concerning ratification.

This year the Administration has done an about-face on the Genocide Convention. Six months after testifying in opposition to any limitation on U.S. acceptance of the World Court's jurisdiction, the State Department strongly supported an Article IX reservation and left open the question of whether it would continue to support ratification in the absence of such a reservation. The change in position was attributed to the Court's decision in the case brought by Nicaragua against the United States for alleged violations of international law. The Administration also cited a "political judgment" that the Senate would not give its advice and consent to the Genocide Convention without an Article IX reservation.

Subsequently Chairman Lugar and Senator Helms proposed a package of eight separate conditions, including the Article IX reservation supported by the Administration. In offering the package, Chairman Lugar informed the Committee that he would not request floor time or support Senate approval of the Convention without these eight provisions.

On May 21, 1985 the Committee unanimously approved four Lugar-Helms conditions that are similar or identical to the provisions previously recommended by the Committee and the Administration. The full package of eight conditions proposed by Senators Lugar and Helms was narrowly adopted by a vote of 9–8. An amendment offered by Senator Dodd to modify the effect of the Article IX reservation was defeated by a vote of 8–9. The Committee then voted 10–0 with 7 Senators voting present to report the Convention favorably to the Senate subject to the Lugar-Helms package of two reservations, five understandings, and one declaration.

We believe the Committee has made a mistake in adopting conditions that would seriously compromise our ratification of the Genocide Convention. While several provisions in the new package merely restate understandings recommended by the Committee in 1970, 1971, 1973, 1976, and 1984, the package as a whole taints the

political and moral prestige that the United States would otherwise gain by ratification of this landmark in international law. The reservations dealing with Article IX and the U.S. Constitution are especiallyl unwise from the standpoint of policy and precedent, and they completely remove the practicial advantages in the advancement of human rights that will be gained by ratification without crippling reservations. We will press vigorously for the deletion of these two reservations when the Genocide Convention is considered by the full Senate.

Article IX: The International Court of Justice

The significance of the Genocide Convention lies in the fact that it forms part of a network of treaties which declare certain actions to be international crimes, justifying concerted action by the world community to bring the perpetrators to trail. A practical benefit of ratification would be the opportunity for the United States to advance its human rights policies by invoking Article IX of the Convention to bring charges against foreign governments who fail to uphold their responsibility to prevent and punish instances of genocide. If the United States itself reserves authority under Article IX, our ratification of the Convention becomes a purely symbolic gesture lacking the substance which would enable us to use the Convention as a valuable weapon for the advancement of human rights throughout the world.

If we adopt an Article IX reservation, the international law doctrine of reciprocity would enable another country to assert our reservation against us, effectively blocking the United States from ever bringing charges in the World Court against countries that have failed to punish instances of genocide. (Conversely, the fact that 19 nations, nearly all Communist-bloc countries, have themselves adopted Article IX reservations would enable the U.S. to invoke these reservations as a check against baseless charges in the Court).

The proponents of an Article IX reservation contend that without such a reservation the United States would be subject to trivial or baseless charges before the World Court. In fact there is nothing to prevent such charges from being brought before the World Court by any nation regardless of whether the court had jurisdiction and regardless of the merits of the charge. In response to a question submitted by Senator Pell at the March 5 hearing the Administration stated that "there is nothing to prevent unfriendly nations which have accepted the compulsory jurisdiction of the World Court from attempting to bring trivial or frivolous charges in the Court." An Article IX reservation is not a safeguard against baseless propaganda.

For the United States to reserve authority under Article IX suggests that we are seriously concerned about the validity of charges which unfriendly nations might attempt to assert in the World Court. Instead of defensively embracing a shield that to date has largely been adopted only by countries that may well have reason to fear charges of genocide, the United States should take the initiative in identifying the perpetrators of genocide and bringing them to account under international law.

Finally, if we proceed to ratify the Genocide Convention with an Article IX reservation, we can anticipate that some of our closest allies will condemn our action and may even refuse to recognize our ratification. A U.S. reservation to Article IX would be circulated to all nations that have previously ratified the Genocide Convention. If any nation wished to object, it would be entitled to do so; the legal effect of the objection depends upon the statement of the objecting party. For example, the Netherlands has objected to Article IX reservations as "incompatible with the object and purpose of the Genocide Convention." Moreover, the Netherlands has taken the position that it does not deem any state making such a reservation to be a party to the Convention. The United Kingdom has similarly stated that a reservation to Article IX "is not the king of reservation which intending parties to the Convention have the right to make." Australia, Belgium, Brazil, and Ecuador have also formally objected to Article IX reservations.

Only nine months ago the Administration testified before this Committee and made these same arguments in opposing an Article IX reservation offered at that time by Senator Helms. Davis R. Robinson, then Legal Adviser to the State Department, noted that the United States is a party to more than 80 multilateral and bilateral treaties and other international agreements with dispute resolution clauses similar to Article IX of the Genocide Convention. No concerns were raised by the Administration last September about the International Court of Justice, despite the fact that the Nicaragua case—later cited as the major reason for the reversal on Article IX—had been before the Court for several months and a preliminary decision on the question of jurisdiction had been issued in May, 1984 (the preliminary decision rejected U.S. arguments on jurisdiction and largely conformed with the final decision issued last November).

We reject the notion that the Court's decision in the Nicaragua case, or any other individual case for that matter, should form the basis for the United States to follow the lead of Communist-bloc nations in deciding when we will agree to participate in ICJ proceedings. As a nation committed to the rule of the law and to the advancement of human rights, we have no need to erect artificial barriers against baseless propaganda charges. In opposing the proposed Article IX reservation at the March 5 hearing, John C. Shephard, the President of the American Bar Association, urged the Committee to "join our allies in rejecting such a reservation as a flimsy crutch for a totalitarian regime." We concur with this view and will urge the Senate to delete the Article IX reservation when the Genocide Convention is brought to the floor.

U.S. Constitution

As reported by the Committee, the resolution of ratification is further undermined by a reservation asserting that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

The Genocide Convention has been the subject of 36 years of detailed legal analysis by numerous authorities. We do not believe

there is any credible contention that the Genocide Convention is in conflict, or could be in conflict, with the U.S. Constitution. The Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," *Reid* v. *Covert,* 354 U.S. 1, (1957). In 1970, then Assistant Attorney General William H. Rehnquist testified that "there are no constitutional obstacles to U.S. ratification of the treaty." The rights of American citizens, he stated, would be fully protected under the Convention "because the Constitution is superior to a treaty no matter how interpreted." This position was fully reaffirmed by the Reagan Administration at hearings held by the Committee on Foreign Relations in September, 1984 and March, 1985.

The purpose of a state in asserting a reservation is to establish the limits of the obligations that are accepted by the reserving state in the treaty contract. The reservation adopted by the Committee in effect says that we ratify the Genocide Convention only insofar as we find no violation of our Constitution in the future. This kind of self-judging reservation is inconsistent with the rationale behind the international law doctrine that a state, once having ratified a treaty, may not invoke provisions in its Constitution or domestic law as an excuse for failure to perform its duties under the treaty contract. The lack of certitude as to our treaty obligation that is suggested by the reservation is contrary to treaty practice as well as disturbing to our allies who have undertaken an unqualified acceptance of the treaty's obligations.

The vagueness of the language calls into question the nature of our ratification. For instance, who decides under this reservation if "legislation or other action" by the United States violates the Constitution? It is unclear whether at some future date a Senate resolution or perhaps an executive branch official could decide that "legislation or other action" in connection with the Genocide Convention violates the Constitution. To condition our acceptance of our treaty obligations with this kind of open-ended reservation suggests that we are not ratifying the Genocide Convention in good faith.

Equally dangerous is the precedent this reservation creates regarding the treaty obligations of other states. The adoption of this kind of self-judging reservation, particularly by other nations that can easily change their constitutions, would create major problems for the United States in enforcing treaty obligations that where it is very much in our interest to hold these nations to their treaty commitments.

This reservation, like the reservation to Article IX, will seriously compromise the political and moral prestige the United States can otherwise attain in the world community by unqualified ratification of the Genocide Convention. It will hand our adversaries a propaganda tool to use against the United States and invite other nations to attach similar self-judging reservations that could be used to undermine treaty commitments. For these reasons we urge our colleagues in the Senate to delete this reservation from the resolution of ratification.

Other Provisions

Of the remaining provisions in the package, three are essentially identical to those previously recommended by the Committee: the understandings regarding "intent" and "mental harm" and the declaration concerning implementing legislation. The Committee previously has recommended an understanding regarding the right of a state to bring to trial before its own tribunals any of its nationals for acts committed outside the state. To this provision the Committee has added new language stating that the pledge to grant extradition in accordance with a state's laws and treaties (Article VII of the Convention) extends only to "acts which would be criminal under the laws of both the requesting and the requested state." This language is modeled on the principle of dual criminality as stated in extradition treaties recently concluded by the United States. Of course, the Genocide Convention, once ratified by the U.S., would not by itself require the extradition of any of our citizens. Once implementing legislation defining and punishing the crime of genocide is enacted, existing extradition treaties not patterned on the standard of dual criminality would have to be specifically amended to encompass the crime of genocide. While superfluous, we do not regard this understanding as harmful to current extradition practice.

A new understanding has been added stating that "acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention." Since it is obvious that any act committed without the specific intent required by Article II is not sufficient to constitute genocide, a question arises as to what the United States is really seeking to accomplish by attaching this understanding. The language suggests that the United States fears it has something to hide. Moreover, the relatively imprecise definition of "armed conflicts" in international law is an invitation to problems and will almost certainly draw adverse comments from other nations trying to figure out what the language is intended to do. To call attention to our fears about being brought to account for acts committed in armed conflicts is really an embarrassment to the United States and should have no place in our ratification of the Genocide Convention.

Another new understanding states that "with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal by a treaty entered into specifically for that purpose with the advice and consent of the Senate." The idea of an international penal tribunal is truly a "dead letter" and had not received serious consideration by the United Nations in over 30 years because of the obvious problems of sovereignty and due process inherent in such a proposal. Moreover, it has always been the Committee's belief as well as the view of successive Administrations that in the unlikely event that a penal tribunal is established, a separate treaty would be required before the United States could accept its jurisdiction. Finally, it is very unclear whether this provision would have any legally binding effect on the action of future Presidents and Congresses. In our

view it has no more binding authority than a "sense of the Senate" resolution.

CONCLUSION

Last October, faced with the prospect of a filibuster in the waning hours of the 98th Congress, the Senate, by a vote of 87-2, passed S. Res. 478, expressing support for the principles contained in the Genocide Convention and declaring its intention to act expeditiously in the first session of the 99th Congress. Consistent with that resolution, we believe the full Senate should be given the opportunity at the earliest possible time to give its advice and consent to the Genocide Convention. Prompt U.S. ratification, especially in this fortieth anniversary year of the liberation of the Nazi death camps, will enormously enhance the Convention's value as an instrument to fight human rights abuses around the world. That value should not be tarnished by reservations which compromise the meaning and obligations inherent in the Genocide Convention.

We urge our colleagues to ensure that the United States lends its undiluted support to the legal and moral authority of the Convention by rejecting the conditions adopted by the Committee on Foreign Relations and replacing them with the three understandings and one declaration that have been previously recommended by the Committee. These provisions are sufficient to clarify our Constitutional concerns and, unlike the conditions adopted by the Committee, are in harmony with the legal and moral treaty obligation that has been undertaken by our allies throughout the world.

RESOLUTION OF RATIFICATION AS APPROVED BY COMMITTEE ON FOREIGN RELATIONS, SEPTEMBER 1984

Resolved (two-thirds of the Senators present concurring therein). That the Senate advise and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948 and signed on behalf of the United States on December 11, 1948 (Executive O, Eighty-first Congress, first session), subject to the following:

UNDERSTANDINGS

(1) The United States Government understands and construes the words "intent to destroy, in whole or in part, a national, ethical, racial, or religious group as such" appearing in Article II, to mean the intent to destroy a national, ethnical, racial, or religious group by the acts specified in Article II in such manner as to affect a substantial part of the group concerned.

(2) The United States Government understands and construes the words "mental harm" appearing in Article II (b) of this Convention to mean permanent impairment of mental faculties.

(3) The U.S. Government understands and construes Article VI of the Convention in accordance with the agreed language of the Report of the Legal Committee of the United Nations General Assembly that nothing in Article VI shall affect the right of any

State to bring to trial before its own tribunals any of its nationals for acts committed outside the State.

DECLARATION

(1) The U.S. Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

VIII. SUPPLEMENTAL VIEWS OF SENATOR CLAIBORNE PELL

From the viewpoint of the international standing of the United States, I believe it particularly important that a Genocide Convention be ratified. All of us who fought in World War II remember its values and the horror of the Holocaust. As one of those and as one, too, who has served on this Committee for 20 years, during which time the Convention has been reported favorably on six occasions, but never acted on by the full Senate, I believe that the Genocide Convention must be ratified. I recall the work that Raphael Lemkin did as he haunted the corridors of the United Nations and of Congress as he developed the very word "genocide" and urged a treaty to outlaw it.

Perhaps I speak a bit personally, too, but I recall the work my own father Herbert C. Pell, U.S. Representative to the United Nations War Crimes Commission, did in helping to have genocide considered a war crime. What is important now is ending the perception of our nation as a major holdout in the family of nations to becoming a party to a treaty designed to prevent and punish the hideous crime of genocide.

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